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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

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No. .....

FREDERICK P. MUSTELL,
Petitioner,

v.

DR. FRANK A. ROSE, et al.,
Respondents.

On Petition for a Writ of Certiorari to the
Supreme Court of Alabama.

PETITION FOR WRIT OF CERTIORARI.

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IN THE

SUPREME COURT OF THE UNITED STATES.

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No. .....

FREDERICK P. MUSTELL,
Petitioner,

v.

DR. FRANK K. ROSE, Individually, and as President of the University of Alabama; DR. S. RICHARDSON HILL, Individually, and as Dean of the Medical College of Alabama; DR. WALTER B. FROMMEYER, Individually, and as a Member of the Junior Promotions Committee of the Medical College of Alabama; DR. W. NICHOLSON JONES, Individually, and as a Member of the Junior Promotions Committee of the Medical College of Alabama; DR. HERSCHEL BENTLEY, JR., Individually, and as a Member of the Junior Promotions Committee of the Medical College of Alabama; DR. GLENN H. BAIRD, Individually, and as a Member of the Junior Promotions Committee of the Medical College of Alabama; DR. JAMES M. SUSSEX, Individually, and as a Member of the Junior Promotions Committee of the Medical College of Alabama; DR. MARGARET KLAPPER, Individually, and as a Member of the Junior Promotions Committee of the Medical College of Alabama; DR. BASIL I. HIRSCHOWITZ, Individually, and as a Member of the Junior Promotions Committee of the Medical College of Alabama; DR JORGE A. LAZARTE, Individually, and as a Member of the Junior Promotions Committee of the Medical College of Alabama; and DR. THOMAS B. PATTON, Individually, and as a Member of the Junior Promotions Committee of the Medical College of Alabama,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Frederick P. Mustell, by his attorney of record, respectfully requests that a Writ of Certiorari be issued to review the judgment of the Supreme Court of Alabama rendered on the 6th day of June, 1968.

OPINION.

The opinion of the Supreme Court of Alabama in question rendered on the 6th day of June, 1968, is reported at 211 So. 2nd 489. A full, true, and correct copy of the opinion and judgment thereon is appended hereto (Appendix "A", pp. 13-30).

JURISDICTION.

Jurisdiction of this court is invoked 28 U. S. Code, Section 1257 (3).

QUESTIONS PRESENTED

1. Does a student in a state supported medical college have any protection under the Fourteenth Amendment of the Constitution when his final grades have been arbitrarily, capriciously, and without just cause changed from that of a passing to that of a failure for the sole purpose of declaring him academically deficient?

2. Does a student in a state supported medical college have a constitutional right to be present and to be represented by counsel before a committee meeting regarding his dismissal from school as a result of an arbitrary and capricious act of a department head who changed his grades?

STATUTES INVOLVED.

Fourteenth Amendment, Constitution of the United States (Appendix "B", p. 30).

STATEMENT OF THE CASE.

Petitioner, a resident of the State of California, entered the Medical College of Alabama in Birmingham, Alabama, in September of 1961. He continued his studies and was promoted to the third year of the medical college in September of 1963. During his third year, his true and rightful grades as earned by him in his courses were as follows:

Preventive Medicine	B
Psychiatry	B
Pediatrics	C
Medicine	B
Surgery	B

The petitioner was taught by Dr. Thomas Patton in Surgery. During his third year, Dr. Patton gave him a grade of 81.9 as a final grade in Surgery. This was shown by Dr. Patton's grade book and final grades (Complainant's Exhibits Nos. 3, 4 and 5; R. 503-506). Petitioner was taught in Medicine by Dr. Buris Boshell. His final grade in Medicine was 81.6 (Complainant's Exhibits Nos. 9 and 10; R. 522-525). After the completion of his third year in the Medical College of Alabama, the Promotions Committee, composed of certain of the respondents, met to determine the students that were to be promoted to the Senior Class. The respondents, who constituted the Promotions Committee, met on May 28, 1964. At the Promotions Committee meeting, the Chairman, Dr. Champ Lyons, who was the head of the Department of Surgery, changed the grade as earned by the petitioner under the instruction of Dr. Patton from 81.5 or a B to 60 or a F (Complainant's Exhibit No. 5; R. 506). The petitioner was not allowed to be present at this meeting. The grade earned by the petitioner in Medicine was changed from a 82.5 to a 60 by the respondent, Dr. Walter B. Frommeyer, prior to said Promotions Committee meeting on May 28, 1964. As a result

of the failure of the petitioner in two major subjects, Medicine and Surgery, the Promotions Committee recommended that he be dismissed from the Medical College of Alabama.

After the petitioner's dismissal from the Medical College of Alabama, he attempted to secure a hearing before the Dean of the Medical College and the members of the Promotions Committee concerning the changing of his grades in Surgery and Medicine. He attempted to contact each one of the members of the Promotions Committee to secure a hearing. After all of these efforts had failed and after he had unsuccessfully attempted to gain admission to numerous medical colleges throughout the United States and Europe, he then filed a proceeding for a mandatory injunction in the Circuit Court of Alabama, Tenth Judicial Circuit, requiring the respondents to restore his changed grades in Medicine and Surgery from failing to passing and to reinstate him in the Medical College of Alabama. He averred in the Bill of Complaint that his grades in Surgery and Medicine had been arbitrarily, capriciously, and without just cause changed from a passing to a failing grade. Further, had his true and rightful grades in Medicine and Surgery been presented to the Promotions Committee meeting he would have been promoted to the Senior Class. He alleged that an actual justifiable controversy existed which affected substantial personal and property rights. Testimony was taken on the 9th day of May, 1966, and the court entered an Interim Decree (Appendix "C", pp. 31-33). This Interim Decree stated, **"that it was not denied that certain of the purported grades of the complainant during and at the conclusion of said meeting of the said Junior Promotions Committee were altered or changed from passing grades to failing grades."** The court in this Interim Decree required the respondents, who were members of the Junior Promotions Committee, to hold an additional meeting for

the purpose of reviewing the decision handed down by the Junior Promotions Committee meeting on May 28, 1964. However, this Interim Decree did not require the instructors in Surgery and Medicine to reinstate the passing grades that had been arbitrarily and capriciously changed. The petitioner was not allowed to be present at this meeting, nor was he allowed to have counsel present in his behalf although counsel requested that he be permitted to appear. As a result of the court's failure to require that his rightfully earned grades be reinstated, the Promotions Committee had the same facts before it as it had at the first meeting when the petitioner was dismissed from medical school in 1964. On May 24, 1966, the committee submitted to the court its written report of a review of the petitioner's medical record at the Medical College of Alabama. Based upon this report the lower court entered its Final Decree on the 24th day of May, 1966 (Appendix "D", p. 33). The petitioner from this decree of the lower court on the 25th day of May, 1966, appealed to the Supreme Court of the State of Alabama. The petitioner in his assignments of error in the Supreme Court of Alabama averred that the decree of the 25th day of May, 1966, denied him his constitutional rights under the Constitution of the United States of America and the Constitution of the State of Alabama. Among the other assignments of error, he averred that his grades in Medicine and Surgery were changed arbitrarily, capriciously, and without just cause. He argued in a brief submitted to the Supreme Court of Alabama that his constitutional rights were abridged. The Supreme Court of Alabama in its decision (Appendix A, pp. 19-20) did not discuss whether or not the petitioner's grades had been arbitrarily and capriciously changed, but decided that school authorities have absolute discretion in determining whether or not a student has been delinquent in his studies. The Supreme Court also decided in its opinion (Appendix A, pp. 29-30) that the petitioner did not have a constitutional right to

be present when a decision was being reached to dismiss him as a student for his failure to meet the required scholastic standards irrespective of the fact that his grades had been arbitrarily changed. In essence, the Supreme Court of Alabama decided that the head of a department had a right to determine a student's rightfully earned grades irrespective of whether or not that department head had actually instructed the student. This decision was in direct conflict with the evidence. Dr. Frank Rose, President of the University of Alabama, testified that only a faculty member that taught a particular student had a right to determine his final grade in a course (R. 49). Dr. Thomas Patton, the professor who taught your petitioner in Surgery, testified that he earned a numerical grade of 81.9 in Surgery (R. 81 through 90). Dr. Patton's testimony was supported by his grade book (Complainant's Exhibit No. 3; R. 503) and his calculation of the petitioner's final grade (Complainant's Exhibits Nos. 4 and 5; R. 504-506). His grades as earned by him in Medicine were changed from 81.6 to a 60 prior to the Junior Promotions Committee meeting. (Complainant's Exhibits Nos. 9 and 10).

The Supreme Court of Alabama in affirming the lower court's decision in essence determine that a department head had a prerogative to determine a student's grade regardless of whether or not that department head had ever instructed the student. The Supreme Court further decided that a student does not have a constitutional right of notice, presence, and representation of counsel when a decision is being reached to dismiss a student for failure to meet the required scholastic standards.

REASONS FOR GRANTING THE WRIT.

In recent years this enlightened court has pronounced in no uncertain terms that the constitutional umbrella of protection extends to people in all phases of life, including the indigent, the union member, the Negro, the illiterate, the teacher, the Communist, the juvenile, and the accused to cite a few. However, this Court has never defined the constitutional rights of a student at a state supported institution to receive an education without capricious and arbitrary interference from school officials. This is not a case involving the single issue of whether or not this petitioner's grades were changed from a passing to a failing grade, but embrace the rights of millions of students now attending colleges of higher learning and their successors. It can hardly be argued that a college education and particularly a medical degree is not an asset which should be afforded the protection of due process of law pursuant to the Fourteenth Amendment of the Constitution of the United States.

The Supreme Court of Alabama and all of the other decisions of higher state courts have long stood behind the theory that "a court does not interfere with the management of a school's internal affairs unless there has been a manifest abuse of discretion or where the school authorities have acted arbitrarily and unlawfully." However, these courts have never set up any procedures to guarantee the constitutional rights of the student under the due process clause of the Fourteenth Amendment of the Constitution of the United States, prior to dismissal. The Courts and institutions have long stood behind this crutch in denying students their constitutional rights to attend a college and to receive a degree provided it has been earned.

A similar situation arose in the case of **Thomas Connely, Jr. v. University of Vermont** and **State Agricultural College**, 244 Fed. Supp. 156 (1965). This was a case where a medical student was dismissed for his failure in Pediatrics-Obstetrics in the third year of medical college. The testimony revealed that the professor that taught this particular student determined in advance of his instruction that he intended to fail this student in this particular course. The court remanded this cause for further hearing on the student's dismissal as being arbitrary and capricious and stated as follows:

> "Where a medical student has been dismissed for a failure to attain a proper standard of scholarship, two questions may be involved; the first is, was the student in fact delinquent in his studies or unfit for the practice of medicine? The second question is, were the school authorities motivated by malice or bad faith in dismissing the student, or did they act arbitrarily or capriciously?" In general, the first question is not a matter for judicial review. However, a student's dismissal motivated by bad faith, an arbitrariness or capriciousnes may be actionable.
>
> * * * * * * * *
>
> ". . . It has been said that courts do not interfere with the management of a school's internal affairs unless 'there has been a manifest abuse of discretion or where (the school officials') action has been arbitrary or unlawful,' **State ex rel. Sherman v. Hyman**, 180 Tenn. 99, 171 S. W. 2d 822, cert. den. 319 U. S. 748, 63 S. Ct. 1158, 87 L. Ed. 1703 (1942), or unless the school authorities have acted 'arbitrarily or capriciously', **Frank v. Marquette University**, 209 Wis. 372, 245 N. W. 125 (1932), or unless they have abused their discretion, **Coffelt v. Nicholson**, 224 Ark. 176, 272 S. W. 2d 309 (1954), **People**

ex rel. Bluett v. Board of Trustees of Illinois, 10 Ill. App. 2d 207, 134 N. E. 2d 635, 58 A. L. R. 2d 899 (1956), or acted in 'bad faith', **Barnard v. Inhabitants of Shelburne**, supra, and see 222 Mass. 76, 109 N. E. 818 (same case).

". . . The effect of these decisions is to give the school authorities absolute discretion in determining whether a student has been delinquent in his studies and to place the burden on the student of showing that his dismissal was motivated by arbitrariness, capriciousness or bad faith. The reason for this rule is that in matters of scholarship, the school authorities are uniquely qualified by training and experience to judge the qualifications of a student, and efficiency of instruction depends in no small degree upon the school faculty's freedom from interference from other noneducational tribunals. **It is only when the school authorities abuse this discretion that a court may interfere with their decision to dismiss a student**" (P. 519-160).

However, this court nor any other court, including **Dixon v. Alabama Board of Education**, infra, has ever defined a student's constitutional rights prior to dismissal.

The only case which discussed the constitutional right of a student not to be arbitrarily dismissed from school was the case of **Dixon v. Alabama Board of Education**, 295 F. 2d 150 (5th Cir.), cert. denied 368 U. S. 930 (1961). In this case Judge Rives stated as follows:

"Whenever a governmental body acts so as to injure an individual, the Constitution requires that the act be consonant with due process of law. The minimum procedural requirements necessary to satisfy

due process depend upon the circumstances and the interests of the parties involved.

"Turning then to the nature of the governmental power to expel the plaintiffs, it must be conceded, as was held by the district court, that power is not unlimited and cannot be arbitrarily exercised. Admittedly, there must be some reasonable and constitutional ground for expulsion or the courts would have a duty to require reinstatement. The possibility of arbitrary action is not excluded by the existence of reasonable regulations. There may be arbitrary application of the rule to the facts of a particular case" (p. 157).

CONCLUSION.

This court should grant a Writ of Certiorari in this case in order to clarify the constitutional rights of a student to receive an education without the interference of arbitrariness or capriciousness on the part of anyone. The students that are enrolled in the colleges and universities are the frame work of our society in the next decade. Certainly these young citizens need the protection of this Court and the constitutional veil to protect actions such that have occurred in this case. The school authorities and instructors standing behind the previous decisions of the lower courts could summarily suspend a student for political reasons, religious reasons, or for personal reasons, and that suspension would be sustained. The students in our country need the assurance of the public, the institutions, and of this court that their rights as citizens are parallel to the other populous of this nation. In these uncertain times, certainly the young students need some assurance that their efforts when given to better themselves will not be in vain.

Therefore, for the foregoing reasons a Writ of Certiorari should be granted by this Court in this cause.

Respectfully submitted,

ROBERT C. BARNETT,
Attorney for Petitioner.

Certificate of Service.

I, Robert C. Barnett, the attorney-of-record for the petitioner, do hereby certify that I have mailed a copy of the foregoing petition to Messrs. Thomas, Taliaferro, Foreman, Burr & Murray, Suite 1130 Bank for Savings Building, Birmingham, Alabama and Honorable Rufus J. Bealle, University of Alabama, Montgomery, Alabama, attorneys-of-record for all respondents, by U. S. Mail, postage prepaid, this 22nd day of August, 1968.

.....
Robert C. Barnett.

APPENDIX "A".

The State of Alabama—Judicial Department.
The Supreme Court of Alabama.

October Term, 1967-68.

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6 Div. 412.

Frederick P. Mustell

v.

Dr. Frank A. Rose, et al.

Appeal From Jefferson Circuit Court, in Equity.

Merrill, Justice.

Appellant filed a bill of complaint seeking a mandatory injunction to require appellees to reinstate him as a student in the Medical College of the University of Alabama, to promote him to the senior class, and to change his grades in the courses of medicine and surgery from failure to passing. The trial court denied relief.

The original bill of complaint was amended, a plea in abatement and demurrers were overruled, and at a pre-trial hearing on March 29, 1966, the issue to be tried was agreed upon and was stated by the court at the beginning of the trial on April 25, 1966:

> "* * * A pre-trial of this cause was held on the 29th day of March, 1966, the purpose of which of course was delineation of the issues involved in this case. And by consent of counsel on both sides, and through

clear understanding, the sole issue involved in this case has been fixed, and the only valid, legal issue posed by the pleading is whether or not the Junior Promotion Committee of the Medical College of the University of Alabama, acting through its agent or employees or professors, arbitrarily and capriciously conspired, to effect the dismissal of the complainant, Frederick P. Mustell, the complainant from the Medical College, and as part of said conspiracy altered or otherwise changed the complainant's grades as earned by him or entered on his record in medical school in his junior year without just cause and in bad faith. I have requested that counsel confine their questions to that particular issue. There is an issue which might be posed by pleadings, and proof in this cause, having to do with possible punitive damages. I have reserved my ruling on the question whether they would adhere in this case. And I think now that we are ready, gentlemen, is there any objection on the part of counsel to the statement made by the Court?

"Mr. Barnett: The complainant has no objections.

"Mr. Thomas: No objection."

Testimony was taken for three days and on May 9, 1966, the court entered an interim decree, the latter part of which reads:

"In view of the fact that Dr. Champ Lyons, Chairman of the said Committee and Chairman of the School of Surgery at the time, was deceased at the time of the trial of this cause and his testimony was not available, and in view of the fact that one or more of the regularly appointed members of said Committee were not personally present at said meeting to vote on promotions and dismissals and in view of the fact that this cause presents, from a consideration of all the evidence, a case of extreme hardship upon complainant, the Court is of the opinion that as many

of the instructors and professors of the Junior Promotions Committee as may be presently alive and connected with the Medical College of the University of Alabama should hold another meeting of said Committee for the purpose of reviewing the decision handed down by said Committee and involving the passing or failure, the retention or dismissal or any other matter affecting complainant in his academic status with the said Medical College which they might desire to consider and deliver whatever recommendations they may desire to make to this Court in writing.

"Therefore, it is Considered, Ordered, Adjudged and Decreed as follows:

"One: That as many of the regularly constituted members of the Junior Promotions Committee who were in that status on May 28, 1964, as are presently alive and connected with the Medical College of Alabama shall hold a meeting forthwith, and review the record of Complainant and the previous activities and meetings of the said Junior Promotions Committee and deliver the recommendations of said Junior Promotions Committee immediately thereafter to this Court for its consideration in arriving at a final decree in this cause.

"Two: The Court expressly reserves this cause for future orders."

The second decision sought by the interim decree (Court's Exhibit A, referred to in the final decree) is not made a part of this record. It is obvious that it was before the trial court and counsel for the parties knew what it contained.

Then, on May 25, 1966, the court entered the following final decree:

"On May 9, 1966, this Court issued an 'Interim Decree' which called for a review by the Junior Pro-

motions Committee of the academic record of Complainant in the Medical College of the University of Alabama with recommendations of the said Committee. On May 24, 1966, the said Committee submitted to the Court (see Court's Exhibit B) its written report of a review of Complainant's record in the Medical College of the University of Alabama, with their recommendations, and all approved by the Dean of the Medical College. Counsel for Respondents submitted said report to the Court along with a forwarding letter (Court's Exhibit A).

"As indicated in said 'Interim Decree' of May 9, 1966, 'the gist of the Complainant's alleged cause of action is the alleged altering or changing of certain of the recorded grades of Complainant for his academic Junior year in the Medical College of the University of Alabama, arbitrarily or capriciously and without just cause and in bad faith.' By amendment, at the close of oral hearing, Complainant further alleged that 'had his true and rightful grades earned by him in Surgery during his Junior year in the Medical College of Alabama been submitted to the Junior Promotions Committee on May 28, 1964, that said Junior Promotions Committee would not have recommended that he be dismissed as a medical student in the Medical College of Alabama.'

"The Bulletin of the Medical School of the University of Alabama is in evidence in this cause. Among its provisions are the following: 'recommendations to the Dean for actions affecting the promotion or dismissal of students will rest with the respective Freshman, Sophomore, Junior, or Senior Promotions Committee'; and further 'the Action of the Promotions Committee will be governed by the following principles:

"(1) Students who have received no grade less than C shall be considered as eligible to promotion to the next higher class. Second year students are required to take Part I of National Board of Medical Examination to be promoted to third year standing.

"(2) It is required that fourth year students take and pass Part II of the National Board of Examiners Examination to qualify for graduation.

"(3) The faculty reserves the right to refuse to promote or graduate any student who in the opinion of the faculty is not considered qualified for any just reason for the practice of medicine.

"(4) It should be emphasized that recommendations for promotions or dismissals are the action of Committees and not individuals.'

"This Court rules that the student and the Medical College of the University of Alabama are bound by the statements and representations made in the Bulletin as set out above.

"The evidence in this cause was lengthy and it reveals a carefully planned system of continuous check on the performance of all students by the personnel, staff, committees and the administrative officers of the Medical College. Several tentative grades are entered in the record of the individual student, but the final grade is determined only by the department heads, after a general survey by them of the student's total knowledge and performance in that department.

"The evidence further reveals, in the Court's opinion, that the attitude of the heads of the departments and the Dean of the Medical School and those who had the responsibility of final decision regarding the scholastic destiny of the student was uniformly beneficent and manifested a desire on the part of these

persons to aid this student in his scholastic endeavors. In the Court's opinion, there is no evidence of discrimination or unfairness in these dealings with this Complainant. After Complainant's dismissal, letters written by the Dean of the Medical College to one or more other Medical Colleges where Complainant was seeking admission reflect a desire to help Complainant.

"From the evidence, to the satisfaction of the Court, if further appears that there was no conspiracy of any kind against this Complainant by any of the Respondents. The ultimate decisions regarding Complainant's scholastic progress came as a composite calculation of all elements of Complainant's performance and knowledge. The use and purpose of grades was to afford general information regarding some, but not all, of the factors involved in the student's performance.

"The following question arises in the mind of the Court and is helpful toward a decision of this cause: Do the scholastic heads, in charge of the course of study of a medical student in the Medical College of the University of Alabama, have the power to determine, from an overall consideration of a student's knowledge and performance (including his grades), his ultimate fitness to practice medicine, and to dismiss him as a student if, in their professional opinion, in fairness and without bias, the overall knowledge and performance of the student warrants dismissal? The Court must answer this question in the affirmative.

"Accordingly, it is Considered, Ordered, Adjudged and Decreed as follows:

"One: That the actions of the Junior Promotions Committee and the other officials of the Medical Col-

lege of the University of Alabama, including all of the Respondents in this cause, which resulted in the ultimate dismissal of Complainant from said Medical College were not arbitrary, capricious, without just cause or in bad faith, and, further that had the alleged 'true and rightful grades' earned by him in certain courses during his Junior year in the said Medical College been presented to the Junior Promotions Committee on May 28, 1964, the ultimate result would have been the same, namely; Complainant's dismissal from said Medical College.

"Two: That the relief requested by Complainant in his Bill of Complaint as amended is denied.

"Three: Costs of Court in this cause are taxed to Complainant, for which let execution issue.

"Done and Ordered this 25th day of May, 1966.

"William C. Barber,
"Circuit Judge in Equity Sitting".

We quote and approve the following excerpts from **Connelly v. University of Vermont and State Agr. College**, 244 F. Supp. 156:

"Where a medical student has been dismissed for a failure to attain a proper standard of scholarship, two questions may be involved; the first is, was the student in fact delinquent in his studies or unfit for the practice of medicine? The second question is, were the school authorities motivated by malice or bad faith in dismissing the student, or did they act arbitrarily or capriciously? In general, the first question is not a matter for judicial review. However, a student dismissal motivated by bad faith, arbitrariness or capriciousness may be actionable.

• • • • • • •

"This rule has been stated in a variety of ways by a number of courts. It has been said that courts do not interfere with the management of a school's internal affairs unless 'there has been a manifest abuse of discretion or where (the school officials') action has been arbitrary or unlawful,' State ex rel. Sherman v. Hyman, 180 Tenn. 99, 171 S. W. 2d 822, cert. den., 319 U. S. 748, 63 S. Ct. 1158, 87 L. Ed. 1703 (1942); or unless the school authorities have acted 'arbitrarily or capriciously,' Frank v. Marquette University, 209 Wis. 372, 245 N. W. 125 (1932); or unless they have abused their discretion, Coffelt v. Nicholson, 224 Ark. 176, 272 S. W. 2d 309 (1954); People ex rel. Bluett v. Board of Trustees of University of Illinois, 10 Ill. App. 2d 207, 134 N. E. 2d 635, 58 A. L. R. 2d 899 (1956); or acted in 'bad faith', Barnard v. Inhabitants of Shelburne, supra, and see 222 Mass. 76, 109 N. E. 818 (same case).

"The effect of these decisions is to give the school authorities absolute discretion in determining whether a student has been delinquent in his studies, and to place the burden on the student of showing that his dismissal was motivated by arbitrariness, capriciousness or bad faith. The reason for this rule is that in matters of scholarship, the school authorities are uniquely qualified by training and experience to judge the qualifications of a student, and efficiency of instruction depends in no small degree upon the school faculty's freedom from interference from other non-educational tribunals. It is only when the school authorities abuse this discretion that a court may interfere with their decision to dismiss a student.

* * * * * * *

"The rule of judicial nonintervention in scholastic affairs is particularly applicable in the case of a med-

ical school. A medical school must be the judge of the qualifications of its students to be granted a degree; Courts are not supposed to be learned in medicine and are not qualified to pass opinion as to the attainments of a student in medicine. People ex rel. Pacella v. Bennett Medical College, 205 Ill. App. 324. * * *"

The instant case would not properly have been before the trial court of this court on appeal except for the appellant's allegations (1) that "prior to the Junior Promotions Committee meeting on March 5, 1964, that the respondents, Dr. William B. Frommeyer and Dr. Buris R. Boshell, arbitrarily and capriciously changed the grades earned by the complainant in his course of Medicine during his junior year without just cause and in bad faith;" (2) "that Dr. Champ Lyons, as a member of the Junior Promotions Committee, arbitrarily and capriciously altered or otherwise changed the complainant's grade as earned by him in Surgery from that of an 81.5 or a B, to that of a 65 or F, without just cause and in bad faith;" and (3) "that the Junior Promotions Committee of the Medical College of the University of Alabama, acting through its agent, employees and professors, arbitrarily and capriciously changed the complainant's grades as earned by him and entered on his record in the Medical College of Alabama in his Junior year without just cause and bad faith in the course of Medicine and Surgery."

Appellant states in brief: "Any discretionary act of the Junior Promotions Committee as a whole is not an issue on this appeal. We are only concerned with the arbitrary and capricious acts of Dr. Champ Lyons and Dr. Frommeyer in arbitrarily and capriciously changing the Complainant's grades in Surgery and Medicine. These arbitrary and capricious acts ultimately led to the

decision of the Junior Promotions Committee to dismiss the Complainant."

Appellant, thirty-eight years of age at the time of trial, was admitted to the Medical College of Alabama as a freshman in September, 1961. He was promoted successively to the sophomore and junior classes. It appeared to be the custom and unwritten policy that, generally, a student who failed only one course was permitted to repeat it, but a student who failed two courses the same year was dismissed from the college. Appellant's final official grades in the third year class, 1963-64, were Medicine F, Surgery F, Preventive Medicine & Public Health B, Pediatrics C, and Psychiatry B. He received these grades by mail in June, but a letter dated May 29, 1964, the day after the meeting of the Junior Committee on Promotions, was sent to and received by him, which reads:

> "The Committee on Promotions has carefully considered your academic progress, and regrets that your academic performance has been so poor. In view of the number of failing grades you have incurred, a decision to terminate your attendance at the Medical College was made.
>
> "Your inability to meet those requirements would indicate that you are not in the proper field of endeavor."

This letter was written pursuant to the recommendations of the Promotions Committee to Dean Hill. This committee met on the afternoon of May 28, 1964. Those present were Dr. Champ Lyons, Chairman of the Junior Promotions Committee and Head of the Department of Surgery; Dr. Herschel Bentley, Jr., Head of the Department of Pediatrics; Dr. W. N. Jones, Chairman of the Department of Obstetrics and Gynecology; Dr. Jorge Lazarte, representing the Department of Psychiatry; Dr.

Glen Baird of the Department of Preventive Medicine and Public Health; Dr. Basil Hirschowitz, representing the Department of Medicine; Dr. Margaret Klapper, Assistant Dean of the Medical College; Dr. S. Richardson Hill, Dean of the Medical College; and Miss Virginia Baxley, Registrar of the Medical College. Dr. Lazarte was substituting for Dr. James N. Sussex, Chairman of the Department of Psychiatry, and Dr. Hirschowitz was substituting for Dr. Walter B. Frommeyer, Chairman of the Department of Medicine. As a result of this meeting, appellant and two other junior students were notified that they had been dismissed from the Medical College.

In view of the fact that we are affirming the decree of the trial court, we do not cover the full testimony, but only that which justifies the conclusion reached by the trial court.

Grade in Medicine.

Many witnesses testified on this subject but we will not devote much space to it. It appears that appellant apparently concedes that he failed the course because his brief states: "We submit that he (appellant) had passed his courses with the possible exception of Medicine, but was entitled to repeat that course."

Dr. Murdaugh, one of the instructors in Medicine, in discussing appellant with Dr. Meador, another instructor in Medicine, accused appellant of "intellectual dishonesty" which was defined by the instructor as "a fabrication of information in medicine, this carries the connotation of patient neglect. It carries the connotation of great danger in medicine in the care of a sick person. Giving wrong information when asked a direct question." His inability to say "I don't know" was repeatedly exhibited. One notation by another instructor on his record called him a "bluffer." Another instructor wrote that he

"Seems disorganized and tries to make up for it pure bull." These last three notations appear on appellant's exhibits, some of which contain laudatory statements concerning him and his work.

It is interesting to note on the allegations of conspiracy that neither Dr. Frommeyer, Chairman of the Department of Medicine, nor Dr. Boshell, head of the third year in Medicine, had never heard of the charge of "intellectual dishonesty" until the trial. Appellant was repeatedly warned about his "poor performance" but his grades in medicine continued to fall, and at the end of the winter quarter, it was proposed that appellant be given a special examination by Drs. Frommeyer and Boshell. They assigned appellant to a patient and he made several mistakes in the diagnosis, some of which were serious. Dr. Boshell signed a statement giving a record of their examination of appellant and stated: "It is the opinion of Dr. Frommeyer and myself that this student does not know enough facts to pass third year medicine. In addition, he makes a very grave error of stating things very strongly **as fact** that are not true and does not seem to realize that such is the case. It is therefore our opinion that he should be failed in the third year medicine course."

Appellant was notified on March 6, 1964, by letter, that he had failed the third year course in medicine and the next meeting of the Promotions Committee would decide whether he would be permitted to repeat the course in the summer of 1964. On May 11, 1964, appellant left a note with the registrar asking help to be allowed to repeat medicine at the University of California Medical School.

Appellant's chief contention is that an average of certain grades he had received would show that he passed medicine. The testimony of Dr. Boshell is conclusive that these are tentative grades. Then, it was Dr. Boshell's duty to call a session to review the student's performance and

then a grade was turned in to Dr. Frommeyer, the head of the Department, who turned in a final grade to the registrar. Both Dr. Boshell and Dr. Frommeyer gave appellant a failing grade, Dr. Boshell a 69 and Dr. Frommeyer a 60, and an "F" was turned in by Dr. Frommeyer as his grade on the course. An excerpt of the minutes of the March 5th meeting read:

> "Frederick Mustell—The Department of Medicine reported that this student failed his course in third year medicine during the Winter Quarter of 1963-64 which has just ended. This student will have to repeat third year medicine during the Summer of 1964."

The evidence supports the awarding of a failure in medicine.

Grade in Surgery.

In 1963-64, Dr. Champ Lyons was Chairman of the Department of Surgery; Dr. Thomas B. Patton was a Professor of Surgery and Head of the Section of General Surgery; and next in line was the chief resident, the overall instructor, Dr. Eugene Sherlock.

At the time of the trial, Dr. Sherlock had left the Medical College and was Chief of Plastic Surgery at the Columbia Presbyterian Medical Center. He had an M. D. degree from the Medical College of Alabama, had interned there and had done four years general surgery at University Hospital. He was responsible for the hospital ward to which appellant was assigned. He testified that it was reported to him that appellant was not doing well in Surgery, that he knew himself that appellant was having difficulty, and approximately half way through the course, he reported to Dr. Patton that appellant was having difficulty and requested that Dr. Patton talk with appellant and get him to work harder. He further testified that at the end of the course, appellant was deficient as to his knowledge and

qualifications in Surgery; that he gave appellant a grade of 80. He said, "80 would be the lowest grade. He would be low man on the totem pole in the group. It would be the lowest grade I would put." He said that at the time he gave the grade he did not think appellant was qualified to pass the junior grade in Surgery and go into the senior grade. He testified that he had a conversation with Dr. Lyons about appellant's performance.

Dr. Patton testified that he talked with appellant during the term and told him they were worried about his ward work. Near the end of the term, he and other instructors gave appellant an oral examination and give him a grade of 70, which was barely passing; and that it "was a rule that anyone receiving a grade of 70 or below on the oral examination would be referred to Dr. Lyons for his re-examination, for his counsel, or whatever else was deemed indicated." When he submitted a list of grades of the surgery students to Dr. Lyons, which showed appellant with a 70 on oral examination, he told Dr. Lyons "that Mr. Mustell was one of the individuals that we thought he should talk to."

Dr. Patton testified that under the procedure that was followed in the Department of Surgery that year, Dr. Lyons was the final arbiter in all gradings. He stated that the final grades he submitted to Dr. Lyons "were submitted for his perusal, for his comment, for his amendment, for his revision"; and they were not final until they were entered on a blue sheet by the Chairman of the Surgery Department, Dr. Lyons. Dean Hill also testified that it was up to the Chairman of the Department to put all the grades of the instructors in perspective, and make and arrive at the final grade.

The list of grades submitted to Dr. Lyons by Dr. Patton showed appellant and one other student with a grade of 70 on oral examination and one other student with

a failing grade (65) on ward work. When next seen by Dr. Patton, a 65 had been written over the 70 by the name of appellant and one other student and the three 65 grades were circled and Dr. Lyons had written the word "FAIL" by each of the names.

Appellant admits that he was called in by Dr. Lyons on the morning of the day that the Promotions Committee met, that they had a five to ten minute discussion, but that Dr. Lyons did not examine him about the course in surgery and there "was never any discussion of surgery whatsoever."

This interview was on May 28, 1964. Dr. Lyons died on October 25, 1965, after a short illness. The instant suit was filed November 2, 1965.

We come now to the meeting of the Promotions Committee. Every person present at that meeting testified except Dr. Baird, who was ill at the time of the trial. The testimony was that Dr. Lyons, as Chairman of the Junior Promotions Committee, told them that three junior students were deficient in their subjects and the committee needed to discuss them. He named appellant as one of the students and it was brought up that appellant had been reported as having failed medicine at the March 5th meeting. All the people present at the May 28th meeting of the Promotions Committee testified that Dr. Lyons stated to them that he had just given the appellant an oral examination, and that he was inadequate in his knowledge of surgery and did not deserve to pass and be promoted. After a discussion, the vote was unanimous to recommend that appellant be dismissed from Alabama Medical College. Dr. Bentley testified that he sat next to Dr. Lyons and saw him write the word "FAIL" on the surgery grade sheet which Dr. Patton had turned in to Dr. Lyons.

The minutes of the meeting of the committee in reference to appellant read (except as to the names of two students):

> "I. The Chairman asked the Committee to consider three third year students, two of whom had been brought up for discussion at the meeting of this committee on March 5, 1964. These students were:
>
> "1. Mustell, Frederick . . . Medicine F; Surgery F; Pediatrics C.
>
> "2. • • •
>
> "3. • • •
>
> "The performance of each of the above three students was discussed in detail for their entire tenure in medical school. On the basis of each student's total evaluation, the committee recommended to the dean that each student be dropped from medical school.
>
> "On the basis of each student's total evaluation, the committee recommended that the dean advise each student to change his field of interest."

Dean Hill testified that he heard the recommendation of the committee, he concurred in it, acted on it and notified appellant of the action taken.

We deem it appropriate to include the following testimony of Dean Hill:

> "Q. Can you tell us briefly who Dr. Lyons was, that is, his background; I understand he is dead now.
>
> "A. That is correct.
>
> "Q. Would you just give his background, please, as best you know?
>
> "A. Yes. Dr. Lyons was a graduate of medicine from Harvard Medical School. He was on the faculty at Harvard for a number of years. He was on the

faculty of the Tulane University School of Medicine for a number of years. He came to the Medical College of Alabama as the first full-time chairman of the clinical department at the Medical College of Alabama, and I believe this was in about 1950, or thereabouts. Dr. Lyons was probably one of the most eminent professors of surgery in this country if not in the world. He has received many honors throughout his career. He was on many national and international councils and meetings. He was a very outstanding individual. He had an outstanding department of surgery. He was an academician of the highest caliber, and one who always based his judgment on sound facts and one whose judgment, I think, was respected by everyone."

Where the evidence is heard orally before the trial court, the finding of the court has the effect of a jury's verdict and will not be disturbed on appeal, unless plainly erroneous, whether in law or equity. **Norton v. Norton**, 280 Ala. 307, 193 So. 2d 750. We cannot say that the decree of the trial court was plainly erroneous.

Appellant argues that the decision that he be dismissed from school took place in his absence and that he was not permitted to be present at the hearing, and cites **Dixon v. Alabama State Board of Education**, 5 C. A., 294 F. 2d 150. That case is not apt authority. The dismissal there was based upon misconduct, not deficiency in grades. Even the federal courts have not yet gone so far as to require the notice and presence of the student when a decision is being reached to dismiss a student for failing to meet the required scholastic standards. In **Barnard v. Inhabitants of Shelburne**, 216 Mass. 19, 102 N. E. 1095, it was said:

"• • • Misconduct is a very different matter from failure to attain a standard of excellence in studies.

A determination as to the fact involves investigation of a quite different kind. A public hearing may be regarded as helpful to the ascertainment of misconduct and useless or harmful in finding out the truth as to scholarship."

See Annotation, 58 A. L. R. 2d 903, at 906; Woody v. Burns, Fla. App., 188 So. 2d 56.

Affirmed.

Livingston, C. J., Harwood and Kohn, JJ., concur.

APPENDIX "B".

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX "C".

In the Circuit Court, Tenth Judicial Circuit
of Alabama—in Equity.

Frederick T. Mustell,
Complainant,
vs.
Dr. Frank K. Rose, et al.,
Respondents.
} Case No. 140-790.

Interim Decree.

This cause came on to be heard on pleadings and proof as noted. "Demurrer to Bill of Complaint as Amended Filed on Behalf of Each Respondent" is overruled.

The gist of the Complainant's alleged cause of action is the alleged altering or changing of certain of the recorded grades of Complainant for his academic Junior year in the Medical College of the University of Alabama, arbitrarily and capriciously and without just cause and in bad faith.

Under the evidence, it appeared that the Junior Promotions Committee, composed of several different instructors and professors engaged in teaching or superintending the courses of study at said Medical College of Alabama, was empowered, "for any just reason" to record the failure or dismissal of any student to the Dean of the college, and that said Committee did meet and did recommend the dismissal of Complainant. It is not denied that certain of the recorded grades of Complainant, during or at the conclusion of the said meeting of said Junior Promotions Committee, were altered or changed from passing grades to failing grades. Present at said meeting were the following: Dr. Champ Lyons, Dr. Margaret Klapper, Dr.

Walter B. Frommeyer, Dr. Buris R. Boshell, Dr. H. Bentley, Jr., Dr. Robert Barnett and Dr. Jorge A. Lazarte. Dr. Champ Lyons, who was the Chairman of the Department of Surgery of the College, also acted as Chairman of the meeting until he relinquished the chair in order to report a failing grade for Complainant and make a statement regarding Complainant's academic status. Certain of the regularly appointed members of said Junior Promotions Committee were not present, except by proxy or substitute professor or instructor.

In view of the fact that Dr. Champ Lyons, Chairman of the said Committee and Chairman of the School of Surgery at that time, was deceased at the time of the trial of this cause and his testimony was not available, and in view of the fact that one or more of the regularly appointed members of said Committee were not personally present at said meeting to vote on promotions and dismissals and in view of the fact that this cause presents, from a consideration of all the evidence, a case of extreme hardship upon Complainant, the Court is of the opinion that as many of the instructors and professors of the Junior Promotions Committee as may be presently alive and connected with the Medical College of the University of Alabama should hold another meeting of said Committee for the purpose of reviewing the decision handed down by said Committee and involving the passing or failure, the retention or dismissal or any other matter affecting Complainant in his academic status with the said Medical College which they might desire to consider and deliver whatever recommendations they may desire to make to this Court in writing.

Therefore, it is Considered, Ordered, Adjudged and Decreed as follows:

One: That as many of the regularly constituted members of the Junior Promotions Committee who were in that

status on May 28, 1964, as are presently alive and connected with the Medical College of Alabama shall hold a meeting, forthwith, and review the record of Complainant and the previous activities and meetings of the said Junior Promotions Committee and deliver the recommendations of said Junior Promotions Committee immediately thereafter to this Court for its consideration in arriving at a final decree in this cause.

Two: The Court expressly reserves this cause for future orders.

Done and ordered this the 9th day of May, 1966.

Wm. C. Barber,
Circuit Judge in Equity Sitting.

cc:
Hon. Rufus Bealle,
Hon. Andrew Thomas,
Hon. Robert Barnett.

APPENDIX "D".

In the Circuit Court, Tenth Judicial Circuit
of Alabama—In Equity.

Frederick T. Mustell,
Complainant,
vs.
Dr. Frank K. Rose, et al.,
Respondents.
} Case No. 140-790.

Final Decree.

On May 9, 1966, this Court issued an "Interim Decree" which called for a review by the Junior Promotions Committee of the academic record of Complainant in the Medical College of the University of Alabama with recommen-

dations of the said Committee. On May 24, 1966, the said Committee submitted to the Court (see Court's Exhibit B) its written report of a review of Complainant's record in the Medical College of the University of Alabama, with their recommendations, and all approved by the Dean of the Medical College. Counsel for Respondents submitted said report to the Court along with a forwarding letter (Court's Exhibit A).

As indicated in said "Interim Decree" of May 9, 1966 "the gist of the Complainant's alleged cause of action is the alleged altering or changing of certain of the recorded grades of Complainant for his academic Junior year in the Medical College of the University of Alabama, arbitrarily or capriciously and without just cause and in bad faith." By amendment, at the close of oral hearing, Complainant further alleged that "had his true and rightful grades earned by him in Surgery during his Junior year in the Medical College of Alabama been submitted to the Junior Promotions Committee on May 28, 1964, that said Junior Promotions Committee would not have recommended that he be dismissed as a medical student in the Medical College of Alabama."

The Bulletin of the Medical School of the University of Alabama is in evidence in this cause. Among its provisions are the following: "recommendations to the Dean for actions affecting the promotion or dismissal of students will rest with the respective Freshman, Sophomore, Junior or Senior Promotions Committee"; and further "the Action of the Promotions Committee will be governed by the following principles:

(1) Students who have received no grade less than C shall be considered eligible to promotion to the next higher class. Second year students are required to take Part I of National Board of Medical Examiners Examination to be promoted to third year standing.

(2) It is required that fourth year students take and pass Part II of the National Board of Examiners Examination to qualify for graduation.

(3) The faculty reserves the right to refuse to promote or graduate any student who in the opinion of the faculty is not considered qualified for any just reason for the practice of medicine.

(4) It should be emphasized that recommendations for promotions or dismissals are the action of Committees and not individuals."

This Court rules that the student and the Medical College of the University of Alabama are bound by the statements and representations made in the Bulletin as set out above.

The evidence in this cause was lengthy and it reveals a carefully planned system of continuous checks on the performance of all students by the personnel, staff, committees and the administrative officers of the Medical College. Several tentative grades are entered in the record of the individual student, but the final grade is determined only by the department heads, after a general survey by them of the student's total knowledge and performance in that department.

The evidence further reveals, in the Court's opinion, that the attitude of the heads of the departments and the Dean of the Medical School and those who had the responsibility of final decision regarding the scholastic destiny of the student was uniformly beneficent and manifested a desire on the part of these persons to aid this student in his scholastic endeavors. In the Court's opinion, there is no evidence of discrimination or unfairness in these dealings with the Complainant. After Complainant's dismissal, letters written by the Dean of the Medical College to one or more other medical colleges where Com-

plainant was seeking admission reflect a desire to help Complainant.

From the evidence, to the satisfaction of the Court, it further appears that there was no conspiracy of any kind against this Complainant by any of the Respondents. The ultimate decisions regarding Complainant's scholastic progress came as a composite calculation of all elements of Complainant's performance and knowledge. The use and purpose of grades was to afford general information regarding some, but not all, of the factors involved in the student's performance.

The following questions arises in the mind of the Court and is helpful toward a decision of this cause: Do the scholastic heads, in charge of the course of study of a medical student in the Medical College of the University of Alabama, have the power to determine, from an overall consideration of a student's knowledge and performance (including his grades), his ultimate fitness to practice medicine, and to dismiss him as a student if, in their professional opinion, in fairness and without bias, the overall knowledge and performance of the student warrants dismissal? The Court must answer this question in the affirmative.

Accordingly, it is Considered, Ordered, Adjudged and Decreed as follows:

One: That the actions of the Junior Promotions Committee and the other officials of the Medical College of the University of Alabama, including all the Respondents in this cause, which resulted in the ultimate dismissal of Complainant from said Medical College were not arbitrary, capricious, without just cause or in bad faith, and, further that had the alleged "true and rightful grades" earned by him in certain courses during his Junior year in the

said Medical College been presented to the Junior Promotions Committee on May 28, 1964, the ultimate result would have been the same, namely; Complainant's dismissal from said Medical College.

Two: That the relief requested by Complainant in his Bill of Complaint as amended is denied.

Three: Costs of Court in this cause are taxed to Complainant, for which let execution issue.

Done and Ordered this 25th day of May, 1966.

/s/ Wm. C. Barber,
Circuit Judge in Equity Sitting.

cc: Hon. Andrew J. Thomas,
Hon. Robert Barnett,
Hon. Rufus Bealle.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 447.

FREDERICK P. MUSTELL,
Petitioner,

v.

DR. FRANK A. ROSE, et al.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama.

BRIEF FOR RESPONDENTS

In Opposition to Petition for Certiorari.

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ST. LOUIS LAW PRINTING CO., INC., 411-15 N. Eighth St., 63101. CEntral 1-4477.

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In Opposition to Petition for Certiorari.

PRELIMINARY STATEMENT.

In the section of the petition, entitled "Reasons for Granting the Writ" (P. 7), it is stated that, "In recent years this enlightened court has pronounced in no uncertain terms that the constitutional umbrella of protection extends to people in all phases of life, including the indigent, the union member, the Negro, the illiterate, the teacher, the Communist, the juvenile, and the accused to cite a few." In order to avoid any misunderstanding of the status of the parties to this case, we wish to state that the petitioner does not come within any of said classifications.

We have been advised that the certified transcript of the record in the Supreme Court of Alabama, which has been mailed to the Supreme Court of the United States, contains more pages than are contained in the record on file in the Supreme Court of Alabama, and that the numbering of the pages does not coincide. In this brief, where reference is made to a portion of the record, such will refer to the record on file in the Supreme Court of Alabama, which is the only copy of the record available to the attorney for respondents.

STATEMENT OF THE CASE.

While we submit that the petitioner has failed to show any sound reason for granting certiorari, we shall state what we consider to be the material facts in this case, for the purpose of considering the merits of this petition for a writ of certiorari, and demonstrate that there should be no occasion for review, by the Supreme Court of the United States, of the opinion of the Supreme Court of Alabama.

Petitioner, as complainant, sued respondents, individually, and as members of the Junior Promotions Committee of the Medical College of Alabama, alleging in the complaint, as originally filed (R. 1-9), that he had completed the courses of study in the Freshman, Sophomore and Junior years in said Medical College (R. 4-5); that, on May 28, 1964, the Junior Promotions Committee of said Medical College met for the purpose of determining what students should be promoted to the Senior class; that there resulted at said meeting a conspiracy to change complainant's (petitioner's) actual recorded grades in his courses in Medicine, Surgery and Psychiatry, for the arbitrary and capricious purpose of declaring him academically deficient; that complainant (petitioner) was, on May 29, 1964, informed by respondent, Dr. S. Richardson Hill, Dean of said Medical College, that he was terminated from said Medical College by reason of academic deficiencies as determined and ascertained by the Junior Promotions Committee of the Medical College of Alabama (R. 5-6).

In respondents' answer to the complaint, as originally filed (R. 15-29), the above allegations were denied. It was stated that, at its meeting on May 28, 1964, the Junior Promotions Committee discussed, in detail, the performance of complainant (petitioner) for his entire tenure in said Medical College; and, on the basis of the total evaluation of complainant (petitioner) said Com-

mittee recommended to respondent, Dr. S. Richardson Hill, Dean, Medical College, that complainant be dropped from the Medical College; that Dr. S. Richardson Hill, Dean, Medical College of Alabama, advised complainant (petitioner) by letter, of the decision to terminate his attendance at the Medical College of Alabama, due to the number of failing grades which he had incurred (R. 18, 557).

At the commencement of the trial of this case, the trial judge made the following statement:

> "* * * a pre-trial of this cause was held on the 29th day of March, 1966, the purpose of which of course was delineation of the issues involved in this case. And by consent of counsel on both sides, and through clear understanding, the sole issue involved in this case has been fixed, and the only valid, legal issue posed by the pleading is whether or not the Junior Promotion Committee of the Medical College of the University of Alabama, acting through its agents or employees or professors, arbitrarily and capriciously conspired, to effect the dismissal of the complainant, Frederick T. Mustell, the complainant from the Medical College, and as part of said conspiracy altered or otherwise changed the complainant's grades as earned by him or entered on his record in medical school in his junior year without just cause and in bad faith. I have requested that counsel confine their questions to that particular issue" (R. 44).

In response to question "is there any objection on the part of counsel to the statement made by the Court", counsel for the complainant (petitioner) and for the respondents answered, "No objection" (R. 45).

Testimony was taken, orally, before the trial judge, without a jury, for three days, at the conclusion of which counsel for complainant (petitioner) amended the complaint (R. 36-39). In the amended complaint, it was

alleged, in substance, that the respondent, Dr. Walter B. Frommeyer, arbitrarily and capriciously changed complainant's (petitioner's) grade in Medicine, from a passing to a failing grade (R. 37); that Dr. Champ Lyons, a member of the Junior Promotions Committee, who attended the meeting of said Committee on May 28, 1964 (who died prior to the filing of this case), arbitrarily and capriciously changed complainant's (petitioner's) grade in Surgery from a passing to a failing grade (R. 38); that, had the complainant's (petitioner's) true and rightful grade, in Surgery been presented to the Junior Promotions Committee, at its meeting on May 28, 1964, said Committee would not have recommended that he be dismissed as a student in the Medical College of Alabama (R. 39).

In respondents' answer to the amended complaint (R. 40-41), the above allegations were denied.

Following the trial of this case, an interim decree was entered by the trial judge (R. 560-561), in which it was stated, in part:

> "That as many of the regularly constituted members of the Junior Promotions Committee who were in that status on May 28, 1964, as are presently alive and connected with the Medical College of Alabama shall hold a meeting, forthwith, and review the record of complainant and the previous activities and meetings of the said Junior Promotions Committee and deliver the recommendations of said Junior Promotions Committee immediately thereafter to this Court for its consideration in arriving at a final decree in this cause" (R. 561).

As stated in the opinion of the Supreme Court of Alabama, every member of the Junior Promotions Committee, who attended the meeting thereof on May 28, 1964, testified on the trial of this case, except Dr. Glenn

H. Baird, who was ill; and, Dr. Champ Lyons, who died prior to the filing of this case. Each of the respondents, with the exception of Dr. Baird, and Dr. Frank A. Rose, was present during practically the entire trial, and heard the testimony which was introduced. The respondents, Dr. S. Richardson Hill, Dean, and Dr. Walter B. Frommeyer, Chairman of the Department of Medicine, Medical College of Alabama, were present during the entire trial, and heard all of the evidence which was introduced.

Thereafter, following receipt from the Junior Promotions Committee of a written report of its review of complainant's (petitioner's) record in the Medical College of Alabama, together with its recommendations, all approved by the Dean of said Medical College, the trial judge rendered his final decree in this case denying the relief requested by complainant (petitioner) in his amended complaint (R. 561-564), in which it was stated, in part:

> "That the action of the Junior Promotions Committee and the other officials of the Medical College of the University of Alabama, including all the Respondents in this cause, which resulted in the ultimate dismissal of complainant from said Medical College were not arbitrary, capricious, without just cause or in bad faith, and, further that had the alleged 'true and rightful grades' earned by him in certain courses during his Junior year in the said Medical College been presented to the Junior Promotions Committee on May 28, 1964, the ultimate result would have been the same, namely, complainant's dismissal from said Medical College." (Emphasis added.)

An appeal was taken, from said final decree, to the Supreme Court of Alabama, which, in an opinion dated June 6, 1968 (211 So. 2d 489), affirmed said final decree. A true and correct copy of said opinion is attached, as Appendix "A", to the petition for writ of certiorari.

ARGUMENT.

I.

As answering the first question presented in the petition for writ of certiorari (P. 2), reference is made to **Connelly v. University of Vermont and State Agricultural College**, 1965, D. C., Vt., 244 F. Supp. 156, which is cited in the opinion of the Supreme Court of Alabama. Said case is also cited in the petition (P. 8-9), as authority for the statement that "a court does not interfere with the management of a school's internal affairs unless there has been a manifest abuse of discretion or where the school authorities have acted arbitrarily and unlawfully" (P. 7).

In the opinion of the Supreme Court of Alabama there is cited the following excerpt from the brief filed on behalf of the petitioner in said court:

> "Appellant states in brief:
>
> 'Any discretionary act of the Junior Promotions Committee as a whole is not an issue on this appeal. We are only concerned with the arbitrary and capricious acts of Dr. Champ Lyons and Dr. Frommeyer in arbitrarily and capriciously changing the complainant's grades in Surgery and Medicine. These arbitrary and capricious acts ultimately led to the decision of the Junior Promotions Committee to dismiss the complainant.'"

II.

On the trial of this case there was presented, for the determination of the trial judge, sitting without a jury, a clear question of fact, as delineated in complainant's (petitioner's) amended complaint (R. 36-39), and in respondents' answer thereto (R. 40-41). It is submitted that, in considering this petition, this Court should not

re-examine, as a court of first instance, the findings of fact contained in the final decree of the trial judge and affirmed in the opinion of the Supreme Court of Alabama, which findings of fact, it is submitted, are supported by substantial evidence. **General Motors Corporation v. Washington**, 1964, 377 U. S. 436, 84 S. Ct. 1564, 12 L. Ed. 2d 430; **Bantam Books v. Sullivan**, 1963, 372 U. S. 58, 83 S. Ct. 631, 9 L. Ed. 2d 584; **Norton Co. v. Department of Revenue of State of Illinois**, 1951, 340 U. S. 534, 71 S. Ct. 377, 95 L. Ed. 517.

III.

The second question presented in the petition for writ of certiorari (P. 2) is ambiguously stated. It assumes, as an accomplished fact, that the student has been dismissed from school as the result of an arbitrary and capricious act of a department head who changed his grades. If such assumption is factually correct, then, in line with the principle recognized in **Connelly v. University of Vermont and State Agricultural College**, supra, the dismissal of the student would be actionable. The ambit of such principle, however, does not embrace a hearing, with supporting counsel, before the committee initially responsible for the dismissal, or other administrative unit of the college with the authority to review the action resulting in the dismissal. Such right of action, of necessity, includes a suit of some nature, such as the instant case.

Unless the above assumption is intended to be implied in the second question presented in the petition, it must be construed as posing the question of whether a student, in a state supported medical college, has a constitutional right to be present, being represented by counsel, and to be afforded a hearing, before being dismissed for deficiency in grades, or academic achievement.

The case of **Dixon v. Alabama Board of Education**, 1961, 5th Cir., 294 F. 2d 150, is cited in the petition as

supporting an affirmative answer to said second question. Said case is cited in the opinion of the Supreme Court of Alabama, with the statement that it is not an apt authority, in that the dismissal in said case was based upon misconduct, not deficiency in grades.

Other authorities are cited in the opinion of the Supreme Court of Alabama as supporting the statement that "even the federal courts have not yet gone so far as to require the notice and presence of the student when a decision is being reached to dismiss a student for failing to meet the required scholastic standards." Such includes an apt quotation from the case of **Barnard v. Inhabitants of Shelburne**, 1913, 216 Mass. 19, 102 N. E. 1095.

In the opinion of the Supreme Court of Alabama, there is quoted the statement contained in the annotation, "Right of Student to hearing on charges before suspension or expulsion from educational institution", 58 A. L. R. 2d 903, 906. "Even though a hearing is required prior to expulsion of a student on grounds of misconduct, it may not be required where the student is expelled for his failure to attain to the requisite scholastic standard." The case of **Barnard v. Inhabitants of Shelburne**, supra, is cited as authority for such statement of principle.

The distinction between dismissal of a student for misconduct, on the one hand, and dismissal for scholastic deficiency, on the other hand, is recognized in the case of **Woody v. Burns**, 1966, Fla. App., 188 So. 2d 56, which case is cited in the opinion of the Supreme Court of Alabama, as shown by the following excerpt from the opinion therein:

> "It has been held that constitutional due process requires notice and opportunity for hearing before a student at a tax-supported college or university can be expelled for misconduct. Due v. Florida A. & M. University, 233 F. Supp. 396 (N. D., Fla. 1963), and

Dixon v. Alabama State Board of Education, 294 F. 2d 150 (5th Cir. 1961). This court is compelled to follow these decisions, the basis of which is that a charge of misconduct, as opposed to failure to meet the scholastic standards of the college, depends upon a collection of the facts which are easily colored by the point of view of the witness." (Emphasis added.)

It is submitted that neither the due process provision of the Fourteenth Amendment of the Constitution of the United States, nor any other provision thereof, was violated by the decision of the Supreme Court of Alabama that notice and the presence of the student is not required when a decision is being reached to dismiss a student for failing to meet the required scholastic standards.

CONCLUSION.

In conclusion, it is respectfully submitted that the petitioner has not shown sound and sufficient reason for granting certiorari, and that the petition should be denied.

Respectfully submitted,

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Certificate of Service.

This is to certify that a copy of the foregoing brief has been mailed by United States Mail, properly addressed, and with postage prepaid, to Robert C. Barnett and Barnett & Tingle, 401 Title Building, Birmingham, Alabama, Attorneys for Petitioner, on this the 17th day of September, 1968.

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